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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

MARSHALL EDDIE JONES, JR.,

Defendant and Appellant.

E067613

(Super.Ct.No. INF1600260)

OPINION

APPEAL from the Superior Court of Riverside County. Alfonso Fernandez, Judge. (Retired judge of the Santa Clara Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed in part as modified; reversed in part with directions.

Patricia A. Scott, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Collette C. Cavalier, Deputy Attorneys General, for Plaintiff and Respondent.

FACTUAL AND PROCEDURAL HISTORY

A. PROCEDURAL BACKGROUND

A third amended information charged defendant and appellant Marshall Eddie Jones, Jr., with mayhem under Penal Code¹ section 203 (count 1); assault with a firearm under section 245, subdivision (a)(2) (counts 2, 7); assault with a deadly weapon under section 245, subdivision (a)(1) (counts 3, 8, 9); willful infliction of corporal injury under section 273.5 (counts 4, 10); false imprisonment under section 236 (counts 5, 12); possession of ammunition by a prohibited person under section 30305, subdivision (a) (count 6); and dissuading a witness under section 136.1, subdivision (c)(1) (count 11). The information also alleged that defendant personally used a firearm in the commission of counts 2 and 7 under section 12022.5. The information further alleged for counts 4, 8, 9, and 10 that defendant personally inflicted great bodily injury on the victim under circumstances involving domestic violence under section 12022.7, subdivision (e).

A jury found defendant guilty as charged and found the enhancement allegations to be true.

In a separate proceeding, the trial court found defendant had a prior serious felony conviction within the meaning of section 667, subdivision (a), and a prior strike conviction within the meaning of section 667, subdivisions (b) through (i). The trial court also found true the out-on-bail enhancement allegation under section 12022.1.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

The trial court imposed a term of 16 years for count 1; five years four months each for counts 2 and 7; two years for count 3; three years eight months for count 8; one year four months each for counts 5, 6, and 12; and six years for count 11. The prison terms for counts 4, 9, and 10 were imposed and stayed under section 654. The trial court imposed two more years for the out-on-bail enhancement, and five years for the prior serious felony enhancement. The total determinate term imposed was 49 years four months.

On January 23, 2017, defendant filed a timely notice of appeal.

On October 13, 2018, defendant filed an application to file a supplemental brief to raise an issue based on Senate Bill 1393, which was enacted on September 30, 2018. On October 18, 2018, we granted defendant's request and directed the parties to file supplemental briefs.

B. FACTUAL BACKGROUND

In February of 2013, Doe met defendant. They started dating a couple of months later. The two then lived together on and off. While she was living in defendant's house in Desert Hot Springs, Doe was expected to follow defendant's instructions "down to the letter." If Doe did not follow defendant's rules, he would punish Doe physically. Defendant verbally abused Doe by threatening to kill her children or her mother, or by telling her that he would take her out to the desert and shoot her. Defendant falsely accused Doe of cheating on him or looking at other men, and of taking his money. Doe sometimes had sex with defendant even if she did not want to because he would get upset if she tried to refuse. Doe was a long-term methamphetamine user. She and defendant did methamphetamine together. Defendant had a rule that after 9:00 p.m., Doe had to be

available to do drugs or have sex with defendant, “to be available in every way,” or she would be punished. One time, defendant choked Doe until she passed out. Doe wanted out of the situation, but thought that if she could not get away, she could try to “fix it.” She tried to make defendant happy by doing exactly what he said and agreeing with whatever he wanted her to say.

Defendant had a gun that he kept hidden in dog food at his home. When he got angry, he pointed the gun at Doe and threatened her.

Doe was four feet nine inches tall, and weighed 89 to 90 pounds. Defendant was six feet tall and weighed 180 pounds; he was very strong.

1. *JANUARY 2016: COUNTS 1 THROUGH 6 AND 9*

Doe “got in trouble” with defendant on December 31, 2015. Sometime in January 2016, defendant physically disciplined Doe by caning her, striking her feet and ankles with a stick while she lay face down on the bed. The stick was three to four feet long, and about two inches in diameter. Doe did not remember what started the argument or why it escalated. Doe cried and begged for defendant to stop; defendant got more upset and hit her more. Defendant stabbed Doe’s cheek with a pocketknife because she was “talking too much.” He held her head down and twisted the knife into her face, leaving a scar. Defendant struck Doe in the ribs with his fists. After defendant grew tired of beating Doe with a stick, he whipped her with a thin, brown leather belt all over her body. One of the blows struck Doe in the eye, displacing her retina.

Doe told defendant that she could not see out of her eye; he refused to allow her to seek medical treatment because she would then have to explain how she got injured. Doe

told defendant that she was in pain. Defendant claimed that her injuries were not his fault.

Later in January, when Doe told defendant that he had hurt her, he got angry, pointed his gun at her and said, “I should kill you. I am going to take you out in the desert and kill your ass.” Defendant threatened Doe with the gun several times in January. One time, defendant struck her right foot with a gun so hard that her foot bled heavily. Defendant was angry with Doe’s blood getting in his house. Defendant deliberately burned Doe with cigarettes and a pipe. He also stabbed her hand with a pocketknife.

On January 5, 2016, defendant and Doe drove to a shopping center so defendant could pay his rent. Doe was unable to walk because of her injuries; defendant had to carry her to the car. Defendant did not want to leave Doe at home because he did not trust her. Defendant threw Doe’s cell phone away; he told her that it had fallen into the toilet. When defendant got out of the car to go to the bank, Doe decided to get help because she believed that defendant was going to kill her. She could not run so she tried to get someone’s attention. She eventually got the attention of a passing mail carrier. Doe told him that she needed help and that defendant was going to kill her. The man lifted Doe out of the car and helped her into a nearby grocery store. Police and medical personnel were called. Doe told police that defendant tried to kill her. She told the officer that she had been at defendant’s house for the past four to five days. She said that defendant forced her to orally copulate him and to have anal sex, and that he struck her across the face with a pistol if she did not do it the right way. Doe had swelling on the

left side of her face, above and below her eye, and on the right side of her face below the eye. Doe had bruises on her cheek and jaw line, and cuts on her right hand and left elbow. She had bruising on both sides of one foot. She was scared and frail, was shaking, and experienced difficulty speaking. Doe had to be lifted onto the gurney. She screamed when she tried to stand on her own due to the pain she was experiencing.

Defendant was arrested at his home that same day after a standoff with police that lasted two and one-half hours. A box of .22-caliber ammunition was found on a table in one of the bedrooms. Defendant had a prior felony conviction for robbery; he had been released on bail on January 8, 2017.

A nurse who specialized in sexual assault examined Doe at the emergency room. Photographs of her injuries were shown to the jury. Doe was crying and screaming—she was terrified. Doe had a “goose egg” on her forehead. Her left eye was swollen. She had a cut on her face with dried blood on it, a bruised and swollen cheek, and several bruises across her lips. She had an embolism inside her cheek from being hit on her mouth—her tooth had cracked and ripped part of her cheek. She had petechial hemorrhaging in her left eye, and a healing abrasion over her eye. She had linear bruising on the left side of her neck. Her hand had cuts including a puncture, reportedly from being stabbed. She had a large bruise on her abdomen. Doe told the nurse that she had been hit with a stick and a belt, and that she had been stomped on. She had a long bruise on her left hip with a cluster of bruises at the top. She had burn marks on her foot, hand, and inner thigh from a cigarette or a cigarette lighter. She had several bruises on her legs, clusters of bruises on her back, the back of her left thigh and on her shoulder

blade. Her injuries were consistent with the abuse she reported. The petechial hemorrhages were consistent with her reported history of strangulation. Doe told the examiner she had been strangled several times over the past several days. During the last instance she almost passed out, and did pass gas. A victim who passes gas, urinates or defecates during strangulation is “one step away from being dead.”

During the examination, Doe was still crying out in pain because of her feet and legs. Her left foot was swollen and misshaped and was rotated inward. Specific bruising showed a “loop mark” pattern that suggested the use of a cord or belt. Some bruises were fresh and others were older. Doe had three broken bones in her left foot, multiple fractured bones at the spinous process of her back, and a broken fibula. Doe reported difficulty seeing out of her left eye. At the time of trial, Doe was still blind in her left eye, and she continued to require medical treatment for that injury.

There was no physical finding of forcible sexual assault. Doe told the nurse that she tried to comply with everything defendant wanted because he threatened to kill her mother and her children; also, if Doe ran away he would find her, and he would kill her mother and children. Doe said the bruises on her left hip were where defendant “was stomping on me.” Doe told the nurse that defendant had beat her and punched her in the past and that she had miscarried their child when she was four to five months pregnant.

Doe was hospitalized for about 16 days. After she was released, she was given corrective shoes or boots to wear until her ankles and legs could heal.

2. *FEBRUARY 2016: COUNTS 7, 8, 10, 11, 12*

On January 21, 2016, after Doe's release from the hospital, defendant agreed to bring her some checks that had been mailed to his house and take her to cash them. Doe agreed that she was "stupid" to call him, but she missed him and still thought that she could "fix it." Defendant was nice when he picked her up. He gave her the checks, and she gave him some money for gas and for bringing the checks to her. He took her to his house and was charming that first day. But the next day, things changed. Doe had to make him breakfast, and he became upset that she did not do things "right." He expected her to be "normal." She told him she needed to return to the rehabilitative center where she was receiving care until she could care for herself. Doe had corrective shoes for her injuries from the first incident, but defendant tried to force her to walk even though she had been using a wheelchair, and he refused to let her lean against the walls for support. Sometimes, when she was taking him food, she would have to crawl on her knees and then stand up before she got to the door to give him his food. If she complained about the pain, defendant told her, " 'You did this. . . . It wasn't my fault.' " He berated her for calling the police and denied that he broke her legs. He accused her of trying to have him put in jail for the rest of his life and said she made him lose \$12,000.

Defendant had Doe write letters and make phone calls to the judge, to the police, the district attorney, and others in an attempt to get the charges dismissed,. Defendant told her exactly what to write and who to send it to. Each letter claimed that Doe had filed a false police report and that defendant was innocent. The letters were written after defendant beat Doe again. During one of the 15 to 20 calls she made to one of the

investigators in a single day, she tried to tell him what defendant wanted her to say, that defendant was innocent. If she “messed up,” she had to hang up, and she got a “whooping” from defendant, and then she had to call the investigator again.

Defendant had her post a message on Facebook that said, “Okay. All who [are] feeling sorry for me, don’t. Save your prayers for Marshall Jones. He didn’t kidnap [me] or rape me. None of that. I lied to the police about him, and he is innocent. I was loaded on speed, tried to pass counterfeit money to these Mexicans. They jumped on me, and I went to his house for shelter. He helped me. I got mad at him because he couldn’t let me stay. So please pray for his situation. I feel so much better now that I told everyone the truth.”

Doe and defendant married on February 1, 2016. Defendant gave her a ring but took the ring back after the ceremony was complete. Defendant said that if they were married, she could refuse to testify against him. He instructed her to say, “I cannot do anything for or against my husband.”

Defendant drove her to the police station on February 16, 2016, to drop off letters recanting her allegations. Doe had to walk slowly as her leg was broken, her other ankle was fractured, and her ribs hurt. She wore sunglasses because she still had two black eyes.

While she was with defendant the second time, defendant beat her every day either in his house or in his car. Defendant was mad that Doe had reported him to the police, and he threatened to kill her and her children if she left him before his upcoming court date. Defendant wore combat boots around the house. On February 19, he kicked Doe

several times with his boots. She ended up coughing up blood and bleeding from her vagina. Defendant was angry because she could not stand up because of her other injuries. He beat her with a stick, breaking her legs and toes, so that she could not “run off.” When the stick broke, he tried to use it to stab her in the chest, but the stick entered her right arm and broke a bone. Defendant struck her face with his fist and struck her head, back, arms, and feet with a nine-millimeter handgun. At some point, defendant told Doe, “ ‘If you try to leave before the court date, I’m going to kill you, and I am going to kill your ugly kids and your ugly mama, too.’ ” Another time, defendant pointed the gun at her and told her that he would take her out to the desert and kill her. Defendant made Doe shave her head, telling her he wanted her to be ugly so that others could see what she was like inside. He burned her chest with a cigarette and a methamphetamine pipe.

On February 20, defendant left a voicemail for police stating that Doe was leaving on her own accord and that defendant had not hurt her. In the voicemail, Doe can be heard in the background saying that defendant had asked a friend to come pick her up and take her anywhere in Desert Hot Springs. Doe had a friend take her to her mother’s house. She spent the night with her children and went to the hospital the next day. She told the nurses that defendant had caused her injuries. When police came to the hospital, she told them that she had recanted her earlier story because she wanted defendant to love her.

When Doe was admitted to the hospital the second time on February 21, 2016, she had bruising on both eyes and cheeks, and injuries to both arms. She also had significant bruising around her left ear to the side of her left eye. She had additional bruises on the

right side of her head and more bruising on her chin and neck. Photographs of her injuries were shown to the jury. Doe told a nurse that defendant had “held her captive and would not let her leave.” Doe also said that defendant beat her continuously, hit her with a gun, and would not feed her. Doe had fractured and broken bones in her right arm, right and left legs, fingers on her left hand, her left foot, and multiple fractured ribs. Doe needed surgery to repair some of her injuries and a metal plate was inserted into her arm to stabilize a broken bone. Doe’s injuries were consistent with her statements to the nurse who treated her.

On March 8, 2016, defendant was arrested again.

3. *PRIOR DOMESTIC VIOLENCE*

Doe’s 15-year-old daughter testified that in April 2015, she saw her mother run out of a room, yelling that she did not want to go back into the bedroom. Doe said that defendant was going to hit her. Defendant pushed Doe into a dog cage, making her ear bleed. Defendant made a “pinky promise” that it would not happen again.

M.H. had been romantically involved with defendant on and off since 2010. She and defendant maintained their relationship despite his marriage to Doe. M.H. told a police sergeant that defendant had poked her in the head and knocked her glasses off. He had also threatened to kill her several times. She said that she moved out of their shared home because of his threats. At trial, M.H. did not remember telling police that defendant threatened to kill her on more than one occasion, and did not recall defendant ever threatening to kill her. M.H. denied that defendant was controlling or that he verbally abused her. They once had a misunderstanding and defendant poked her in the

face, causing her glasses to fall off; she was not hurt. She acknowledged that he spat on her face. In a recorded jailhouse telephone call, defendant can be heard repeatedly calling M.H. “bitch” and accusing her of lying to him.

M.H. denied seeing defendant with a gun and claimed that the ammunition found in his house belonged to her.

4. *DEFENSE EVIDENCE*

Joan Williams was also involved romantically with defendant. She saw defendant with Doe on January 4 or 5 outside a liquor store in Desert Hot Springs. Doe got out of the car and walked into the liquor store alone. Williams saw defendant and Doe driving down Palm Drive several times. Defendant told her that Doe was his daughter. Williams did not see any bruises or marks on Doe’s face. Williams saw defendant with a .22 or .25-caliber handgun several times.

DISCUSSION

A. THE TRIAL COURT PROPERLY DECLINED TO STAY THE SENTENCE FOR FALSE IMPRISONMENT FOR COUNT 5, BUT SHOULD HAVE STAYED THE SENTENCE FOR FALSE IMPRISONMENT FOR COUNT 12

Defendant contends the trial court should have stayed his sentences for counts 5 and 12 for false imprisonment because they were part of the same continuous course of conduct as the assaults (counts 2, 3, 7 & 8), and witness dissuasion (count 11). We find that the court properly imposed the sentence for count 5, but agree with defendant that the court should have stayed the sentence for count 12.

Section 654 prohibits multiple punishments for different offenses that are committed in the course of a single intent or objective. Section 654, subdivision (a), provides in pertinent part, “[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.”

“The test for determining whether section 654 prohibits multiple punishment has long been established: ‘Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor.’ ” (*People v. Britt* (2004) 32 Cal.4th 944, 951-952.) “[I]f all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once. [Citation.] [¶] If, on the other hand, defendant harbored ‘multiple criminal objectives,’ which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, ‘even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.’ ” (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

Moreover, “a course of conduct divisible in time, although directed to one objective, may give rise to multiple violations and punishment.” (*People v. DeV Vaughn* (2014) 227 Cal.App.4th 1092, 1113.) “Thus, a finding that multiple offenses were aimed at one intent and objective does not necessarily mean that they constituted ‘one

indivisible course of conduct’ for purposes of section 654. If the offenses were committed on different occasions, they may be punished separately.” (*People v. Kwok* (1998) 63 Cal.App.4th 1236, 1253.)

“In the absence of an explicit ruling by the trial court at sentencing, [appellate courts] infer that the court made the finding appropriate to the sentence it imposed, i.e., either applying section 654 or not applying it.” (*People v. Mejia* (2017) 9 Cal.App.5th 1036, 1045; *People v. Hairston* (2009) 174 Cal.App.4th 231, 239-240.) “[T]he imposition of concurrent terms is treated as an implied finding that the defendant bore multiple intents or objectives, that is, as a rejection of the applicability of section 654.” (*People v. Alford* (2010) 180 Cal.App.4th 1463, 1468.) The trial court is vested with broad discretion in making the factual determination whether the defendant had separate intents and objectives, which warranted separate punishments under section 654. (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.) “A trial court’s implied finding that a defendant harbored a separate intent and objective for each offense will be upheld on appeal if it is supported by substantial evidence.” (*People v. Blake* (1998) 68 Cal.App.4th 509, 512.) Under the substantial evidence standard of review, the trial court’s determination is reviewed in the light most favorable to the judgment and presumes the existence of every fact the trial court could reasonably deduce from the evidence. (*Jones*, at p. 1143; *People v. Akins* (1997) 56 Cal.App.4th 331, 339.)

1. *SEPARATE PUNISHMENT WAS NOT PROPER FOR COUNT 5,
BUT WAS PROPER FOR COUNT 12*

a) False Imprisonment: Count 5

In this case, the evidence at trial concerning the crimes committed in January of 2016 established that defendant had multiple objectives when he committed the assault with the firearm in count 2, assault with a deadly weapon (a stick) in count 3, and false imprisonment in count 5.

Defendant wanted to punish Doe and to inflict pain, and after she was injured, he wanted to prevent her from leaving to obtain medical treatment. Although the timeline of events is not clear, Doe testified that she began to “get in trouble” on December 31, 2015, and the beatings took place sometime between then and January 5, when she was able to beg a passing mail carrier for help. In addition to the assault with a firearm, the assault with a deadly weapon (the stick), and the beating with the belt causing the injury to her eye (the conduct underlying defendant’s mayhem conviction), defendant prevented the victim from leaving through a steady stream of violence and threats of violence.

Defendant stabbed her in the cheek with a pocketknife and struck her in the ribs with his fists. Even after Doe told defendant that she was beaten so badly that she could not see out of one eye, defendant refused to allow her to get medical treatment because he knew the victim would have to disclose how she got her injuries. At some point, when Doe told defendant that he hurt her, he pointed his gun at her and said, “I should kill you. I am going to take you out in the desert and kill your ass.” Defendant threatened her with the gun several times in January. He also burned Doe with cigarettes and a pipe and

stabbed her hand with a pocketknife. Doe was unable to walk because of her injuries and was unable to leave defendant's house. When they eventually left, defendant had to carry Doe and put her in his car. He did not want to leave Doe at home because he did not trust her.

In sum, defendant's actions show that the false imprisonment had a separate objective—to prevent the victim from obtaining medical treatment and to continue to exert his power and control over Doe—different from the objective of the already completed assaults—to punish and inflict pain. Defendant's acts of continuing violence and threats of future violence and refusal to let Doe leave or obtain medical treatment were unnecessary to achieve the objectives of the assaults. Defendant's acts of violence used to restrain Doe and prevent her from leaving increased his culpability. Therefore, the act of false imprisonment is punishable separately from the assaults.

b) False Imprisonment: Count 12

As for count 12, the false imprisonment based on the second incident in February 2016, defendant argues that his objective in that instance overlaps not only with the later assaults (counts 7 & 8), but also with the witness dissuasion conviction in count 11. We agree.

Here, when Doe returned to defendant after her release from the hospital. Defendant insisted again that Doe comply with his rules. She had to make defendant's meals and he became angry if she did not do things "right." Doe needed to wear corrective boots or shoes for her injuries from the first incident. Defendant tried to force her to walk even though she had been using a wheelchair; he refused to let her lean

against the walls for support. She had to crawl through the house to take him food, and then stand up before she got to the door to give him his food. Defendant did not allow her to return to the rehabilitation center for further treatment. He berated her for calling the police and denied that he broke her leg. Moreover, defendant directed Doe to write letters and make phone calls to the judge, the police, the district attorney, and others, admitting she filed a false police report and that defendant was innocent. The letters were written after defendant beat Doe. Also, defendant married Doe to keep her from testifying against him or cooperating with police. Defendant beat Doe every day either in his house or his car. He threatened to kill her children and her mother if she left him before his upcoming court date. Defendant kicked Doe several times while wearing combat boots. He again beat her with a stick, breaking her legs and toes, so that she could not “run off.” He struck her face with his fist, and struck her head, back, arms and feet with a handgun. Defendant pointed the gun at Doe and threatened to take her out to the desert and kill her. He burned her chest with a cigarette and methamphetamine pipe. Doe told a nurse that defendant “held her captive and would not let her leave.” In his closing arguments, the prosecutor told the jury that the following efforts made by defendant constituted witness dissuasion: to convince Doe not to testify against him; to prevent her from reporting him to law enforcement; and to make Doe write letters and make other statements recanting her earlier allegations.

Defendant’s objective and intent in holding Doe in his house cannot be separated from his conduct in assaulting her or his intent to prevent her from reporting the crimes and testifying against him. All of these offenses were committed simultaneously and

there is no distinction in defendant's purposes sufficient to ascribe separate objective or intentions to his conduct. A false imprisonment conviction may not be subject to separate punishment under section 654 where it is part of an indivisible transaction in the commission of another crime subject to greater punishment. (See *People v. Han* (2000) 78 Cal.App.4th 798, 809 [false imprisonment conviction not separately punishable from burglary conviction]; *People v. Martinez* (1980) 109 Cal.App.3d 851, 858 [where the defendant attempted to rape the victim, and afterwards held her for a brief time in an attempt to dissuade her from reporting the crime, false imprisonment is not subject to punishment separate from attempted rape].)

The People concede that defendant's "objectives in committing these crimes [assault and dissuading a witness] overlap to some extent with his objective in false imprisoning Doe the second time." The People, however, contend that defendant's "actions were also intended to humiliate and intimidate Doe, and to demonstrate appellant's power and control over her—a hallmark of domestic abuse." Although these factors may be common objectives in domestic violence, there was no expert testimony or other evidence from which the jury could consider these factors. As provided above, the assaults could not have occurred without the false imprisonment, and the false imprisonment could not have taken place without the assaults. Moreover, the witness dissuasion was intertwined with the false imprisonment where defendant assaulted Doe to keep her at his home to prevent her from reporting the crimes and becoming a witness against him.

Therefore, the sentence on count 12 should have been stayed under section 654.

B. THE JUDGMENT SHOULD BE MODIFIED

The People and defendant agree that the trial court failed to impose the court security fee and court facilities assessment for each count.

In this case, the trial court did not explicitly specify that the court security fee of \$40 under section 1465.8, subdivision (a)(1), and the criminal conviction assessment of \$30 under Government Code section 70373, subdivision (a)(1), were to be imposed for each count. Instead, the court specified only that it imposed “\$40 Court Operations Assessment; \$40 Criminal Conviction Charge.” The minute order, however, reflected that the imposition of these fees and assessments were to be imposed on each count, but the abstract of judgment reflected only one \$40 court security fee and one \$30 criminal conviction assessment.

Appellate courts may correct unauthorized sentences. (*People v. Miles* (1996) 43 Cal.App.4th 364, 367.) The court security fee and criminal conviction assessment are mandatory and may be imposed on appeal. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185-188; *People v. Rodriguez* (2012) 207 Cal.App.4th 1540, 1543, fn. 2.) A separate fee and assessment must be imposed for each conviction, even if the sentence on that conviction has been stayed under section 654. (*People v. Sencion* (2012) 211 Cal.App.4th 480, 484.)

Therefore, we will modify the abstract to reflect a \$40 court security fee and a \$30 criminal conviction assessment for each of the 12 counts.

C. UNDER SENATE BILL 1393, DEFENDANT’S CASE MUST BE
REMANDED FOR THE COURT TO EXERCISE ITS DISCRETION

Effective January 1, 2019, sections 667, subdivision (a) and 1385, subdivision (b), allow a trial court to exercise its discretion to strike or dismiss a prior *serious* felony conviction for sentencing purposes. Under the prior versions of these statutes, the court was *required* to impose a five-year consecutive term for section 667, subdivision (a), prior convictions and had no discretion to strike any prior conviction of a serious felony for purposes of enhancement of a sentence. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971 (*Garcia*).)

In this case, the trial court found that defendant had a prior serious felony conviction within the meaning of section 667, subdivision (a), and a prior strike conviction within the meaning of section 667, subdivisions (b) through (i). Thereafter, the court imposed a mandatory five-year term for the prior serious felony enhancement.

In his supplemental brief, defendant contends that S.B. 1393 applies retroactively to his case because his case would not be final when the amendments to sections 667, subdivision (a), and 1385, subdivision (b), became effective on January 1, 2019. The People concede the amendments are retroactive assuming this case was not final prior to January 1, 2019, but that remand was unnecessary because the trial court would not have exercised its discretion to strike the prior serious felony convictions.

In *Garcia* this court noted that “[w]hen an amendatory statute either lessens the punishment for a crime or, as S.B. 1393 does, ‘ “vests in the trial court discretion to impose either the same penalty as under the former law or a lesser penalty,” ’ it is

reasonable for courts to infer, absent evidence to the contrary and as a matter of statutory construction, that the Legislature intended the amendatory statute to retroactively apply to the fullest extent constitutionally permissible—that is, to all cases not final when the statute becomes effective.” (*Garcia, supra*, 28 Cal.App.5th at p. 972; see also *In re Estrada* (1965) 63 Cal.2d 740, 744-745 [“It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply” including those cases not yet final when the statute becomes effective].)

“In enacting S.B. 1393, the Legislature did not expressly declare that S.B. 1393, or the amendments it makes to sections 667(a) and 1385(b), will apply retroactively to all judgments of conviction which are not final on January 1, 2019, when S.B. 1393’s amendments to sections 667 and 1385 go into effect. [Citation.] But the Legislature also did not expressly declare or in any way indicate that it did not intend S.B. 1393 to apply retroactively, and S.B. 1393 is ameliorative legislation which vests trial courts with discretion, which they formerly did not have, to dismiss or strike a prior serious felony conviction for sentencing purposes. [¶] Thus, under the *Estrada* rule, . . . it is appropriate to infer, as a matter of statutory construction, that the Legislature intended S.B. 1393 to apply to all cases to which it could constitutionally be applied, that is, to all cases not yet final when S.B. 1393 becomes effective on January 1, 2019.” (*Garcia, supra*, 28 Cal.App.5th at p. 973.)

We agree with the reasoning in *Garcia*. Here, the judgment in this case was not final by January 1, 2019. “‘[F]or the purpose of determining the retroactive application

of an amendment to a criminal statute, a judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed.’ ” (*People v. Vieira* (2005) 35 Cal.4th 264, 306.) As such, remand for resentencing pursuant to S.B. 1393 is the proper remedy in this case. (*Garcia, supra*, 28 Cal.App.5th at p. 973.)

The People argue that resentencing is unnecessary because the record supports that the trial court would not have exercised its discretion to strike the prior conviction.

“ “Defendants are entitled to sentencing decisions made in the exercise of the ‘informed discretion’ of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary powers can no more exercise that ‘informed discretion’ than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant’s record.” [Citation.] In such circumstances, we have held that the appropriate remedy is to remand for resentencing unless the record “clearly indicate[s]” that the trial court would have reached the same conclusion “even if it had been aware that it had such discretion.’ ” (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1392.)” (*People v. Chavez* (2018) 22 Cal.App.5th 663, 713.)

In this case, the trial court observed the cruelty of the crimes committed by defendant. The court also imposed aggravated terms for the offenses and eligible enhancements. The court, however, did not expressly state or clearly indicate that it would not exercise discretion to consider striking the sentence for the five-year serious felony prior. Having imposed the maximum sentence for the crimes for which defendant was convicted, and in denying defendant’s motion to strike the prior felony conviction for

purposes of the Three Strikes law and defendant's motion to exercise discretion as to the firearm enhancements, the court punished defendant for his past and current offenses. The additional five-year term was imposed at the end of the court's oral pronouncement, without objection, as it was a mandatory term based on defendant's prior felony conviction in 2005. The record before us does not clearly indicate that the trial court would have declined to strike the prior serious felony enhancement if it had the discretion to do so. (See *People v. McDaniels* (2018) 22 Cal.App.5th 420, 427-428.) As the Supreme Court stated in *People v. Rodriguez* (1998) 17 Cal.4th 253, 257, when the court is unaware it has any discretion in imposing a sentence, a remand is appropriate so the court can exercise informed discretion.

Accordingly, we vacate defendant's sentence and remand this matter to allow the trial court to exercise its discretion, under amended section 12022.53, to strike the prior serious felony enhancement. We emphasize that in resentencing defendant, the court may exercise the full range of its sentencing discretion. We offer no opinion on how the court should exercise that discretion

DISPOSITION

The abstract of judgment is modified (1) to reflect the correct court security fees and criminal conviction assessments as specified in this opinion; and (2) to stay the sentence on count 12 pursuant to section 654. The matter is also remanded with directions to resentence defendant pursuant to sections 667, subdivision (a), and 1385, subdivision (b), as amended by S.B. 1393. If the court reduces defendant's sentence, the

trial court in its discretion may also exercise its discretion and reduce the restitution defendant must pay. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

We concur:

RAMIREZ
P. J.

RAPHAEL
J.